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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities	)	GEN Docket No. 00-185
	)	
To: The Commission	)	

COMMENTS OF THE NATIONAL LEAGUE OF CITIES, THE TEXAS COALITION OF CITIES FOR UTILITY ISSUES, THE CITY OF PALO ALTO, CALIFORNIA, AND THE CITY OF EUGENE, OREGON

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Dated: December 1, 2000

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SUMMARY

The City Coalition shares the *NOI's* goal of promoting the widespread and rapid deployment of high-speed services. We also applaud the FCC's objective of eliminating the inconsistency and ambiguity about the regulatory status of cable modem service created by recent court decisions. We are heartened by the *NOI's* recognition that the Communications Act accords different treatment to different kinds of providers and services, and that the Act therefore may not permit, much less require, the Commission to apply the same Titles of that Act to the offerings of all providers of high-speed Internet services. Any resulting differences in regulatory treatment among providers reflect boundaries drawn by Congress, and that only Congress can change.

1. Regulatory Classification of Cable Modem Service.

Cable modem service is a "cable service." 1996 Act's Conference Report, which is of course the most reliable legislative history, makes clear that the 1996 amendment to the "cable service" definition was intended to include both enhanced services and information services made available to subscribers by a cable operator. The 1996 expansion of the "cable service" definition represents a consistent application of Congress' original intent in the 1984 Cable Act that the "cable service" definition is intended to mark the boundary between those services provided over a cable system that would be exempt from common carrier regulation and all other communications services that could be provided over a cable system. Moreover, cable modem service easily fits within the broad definition of "other programming service," a definition whose plain language is sufficiently broad that it needed no revision to accomplish Congress' purpose in expanding the "cable service" definition in 1996. The original language and legislative

history of the 1984 Cable Act did not freeze the scope of "cable service" and "other programming service" in a time capsule because, as the Supreme Court has recognized, statutory words can enlarge in scope in light of subsequent changes in law or technology to prevent them from becoming anachronistic.

That Congress understood that cable modem service is a "cable service" is underscored by the 1998 Internet Tax Freedom Act, which exempts cable franchise fees under 47 U.S.C. §542 from that Act's moratorium. If cable modem service were not a "cable service," of course, that exemption would be superfluous. In fact, the *only* way to read the pertinent language and legislative history of the 1984 Cable Act, the 1996 Act, and the 1998 Internet Tax Freedom Act together in a coherent, consistent way is to classify cable modem service as a "cable service."

As a "cable service," cable modem service is subject to the requirements of Title VI. The revenues that a cable operator derives from providing cable modem service are subject to cable franchise fees under 47 U.S.C. §542. Further, given that most cable operators currently pay franchise fees on cable modem service and cable modem service has enjoyed explosive growth, there can be no suggestion that franchise fees inhibit the growth of cable modem service. Excluding cable modem service revenues from franchise fees, on the other hand, would deprive local governments of million of dollars of needed revenue, directly contrary to Congress' intent in the 1996 Act.

Cable customer service requirements, facilities and equipment requirements, and privacy requirements can and should be applied to cable modem service. Indeed, Title VI, which for the most part is less regulatory than Title II,

represents an appropriate balance between, on the one hand, the desire to minimize regulation to promote investment and growth and, on the other hand, the need to provide subscribers with certain basic consumer protections that experience with cable modem service to date strongly indicates they need.

Cable modem service is not a "telecommunications service." "Telecommunications," unlike "telecommunications service" and "cable service," is not defined in terms of a service offered, but in terms of a functional capability. Consequently, the mere fact that "telecommunications" functionality is one of several component parts of a service offering does not mean that the service is a "telecommunications service." Indeed, even the most traditional cable services contain a "telecommunications" component, but are not thereby transformed into a "telecommunications service."

As with more traditional cable services, "telecommunications" functionality is but only of many functionalities that are bundled together to form cable modem service. Because a cable operator does not unbundle the "telecommunications" functionality from other components of cable modem service and offer it separately to the public -- either in its offering to end-use subscribers or to third-party ISPs -- a cable operator's provision of a cable modem service does not constitute a "telecommunications service." The *Portland* decision therefore was wrongly decided.

Cable modem service is an "information service" only to the extent that "cable service" is a species of "information service." Because the "cable service" definition was expanded in 1996 to include "information services" and "enhanced

services" offered to subscribers over a cable system, "cable service" and "information service" are not mutually exclusive terms. The *Gulf Power* court erred in concluding otherwise. It also erred in suggesting that cable modem service is not a "cable service."

2. Open Access Issues.

The "open access" question cannot be resolved in a vacuum. It hinges on the proper regulatory classification of a cable modem service. We believe that Congress has clearly classified cable modem service as a "cable service," which in turn means that it is governed by Title VI.

If, however, the Commission were to decide that cable modem service is a "telecommunications service" (wrongly, we believe), then cable modem service must be subject to the full open access requirements of Title II. Forbearance under Section 10 of the Communications Act would be inappropriate, because for at least the next few years, cable operators will enjoy considerable market power with respect to the provision high-speed Internet access to residential customers, evidence to date makes clear that Title II - type open access regulation is necessary to ensure that unaffiliated ISPs have reasonable and non-discriminatory access to the cable modem platform, and the record also demonstrates that regulation is indeed necessary to protect consumers.

3. The Proper Course for the Commission.

The Commission faces a fundamental choice in this proceeding: If, as we believe, cable modem service is a "cable service," the Commission may continue its current "hands-off" policy with respect to that service. If the Commission were instead to conclude that cable modem service is a "telecommunications service," then the

Commission's "hands-off" policy must be abandoned, and cable modem service must be subject to the full panoply of Title II requirements. Moreover, the Commission cannot avoid this choice by labeling cable modem service an "information service," because "cable service" includes information services provided to subscribers over a cable system.

We believe that the Act dictates the proper choice: Cable modem service is a "cable service." To eliminate the ambiguity and inconsistency spawned by *Portland* and *Gulf Power*, the Commission should promptly initiate and complete a rulemaking to classify cable modem service as a "cable service."

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The National League of Cities ("NLC"), the Texas Coalition of Cities for Utility Issues ("TCCFUI"), the City of Palo Alto, California, and the City of Eugene, Oregon (collectively, the "City Coalition" or "Coalition") submit these comments in response to the Notice of Inquiry ("*NOI*"), released September 28, 2000, in the above-captioned proceeding.

NLC is the nation's oldest and largest national organization representing the interests of municipalities, with a current membership of approximately 1,500 municipalities across the nation. In addition, NLC members include 49 state municipal associations which, in turn, represent an additional 18,000 municipalities within their respective states.

TCCFUI is a coalition of approximately 110 cities in Texas that have joined together to, among other things, advocate their interests in municipal franchising, municipal right-of-way management and compensation, municipal public utility

infrastructure, and other related issues before the FCC, the Texas PUC, the Texas legislature and other fora. The City of Palo Alto, in the heart of Silicon Valley, and the City of Eugene, the cultural, economic and educational center of the southern Willamette Valley, serve residents with strong interests in preserving municipal cable franchising authority and right-of-way management and compensation authority, and in making broadband Internet access widely and rapidly available.

All members of the City Coalition, and indeed, all local governments nationwide, share a deep interest in the issues raised by the *NOI*. The regulatory classification of cable modem services under the Communications Act -- whether it is a "cable service," a "telecommunications service," or an "information service" -- will have a dramatic effect on such vital matters as local governments' jurisdiction over cable modem services providers, local governments' franchise fee revenues, and the applicability of customer service standards to cable modem services. Similarly, the question of "open access" is an important one for local governments and the residents that they represent. City Coalition members' primary goal on this issue is that broadband Internet access service be made available to the widest possible number of their residents as rapidly as possible, and at competitive, reasonable rates. Because the *NOI* squarely raises each of these issues, the City Coalition files these comments.

INTRODUCTION

The City Coalition shares the Commission's *NOI* objectives of promoting the widespread and rapid deployment of high-speed services and of promoting a vibrant and

competitive free market for Internet services. *NOI* at ¶2. Achieving those objectives will greatly benefit both local governments and their residents, both of whom are, of course, consumers and potential consumers of Internet and other high-speed services.

Given the ambiguity and inconsistency in recent precedent,[1] we also applaud the FCC's objective of eliminating that ambiguity and establishing a consistent legal and policy framework for cable modem services and the cable modem platform. *NOI* at ¶2.

The City Coalition strongly believes that any legal and policy framework established with respect to cable modem services must be tied solidly to the language and structure of the Communications Act. It should not be based on a simplistic policy preference for uniform treatment of all broadband services providers, unhinged from the lines Congress drew in the Act.

We are therefore heartened by the *NOI*'s recognition that the Act accords different treatment to different kinds of providers and services and that, as a result, the Act may not permit, much less require, the Commission to apply the same Title of the Communications Act to the offerings of all providers of high-speed services. *See NOI* at ¶4. Indeed, as we show below, a careful examination of pertinent provisions of the Act

[1] *Compare AT&T v. City of Portland*, 216 F. 3d 871 (9th Cir. 2000) (holding that cable modem service is both a "telecommunications service" and an "information service") *with Gulf Power Co. v. FCC*, 208 F. 3d 1263, *reh. denied*, 226 F. 3d 1220 (11th Cir. 2000), *cert. petit. filed*, No. 00-832 (U.S. filed Nov. 22, 2000) (holding that Internet service is an "information service" and not a "cable service" or a "telecommunications service") ("*Gulf Power*"), *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712 (E.D. Va. 2000), *appeal pending* No. 00-1680 (4th Cir. filed May 25, 2000) (concluding that cable modem service is a "cable service") ("*Henrico*"), *Comcast Cablevision of Broward County v. Broward County*, No. 99-6934-Civ (S.D. Fla. filed Nov. 8, 2000) (treating cable modem service like a cable service) ("*Broward*"), and *Internet Ventures*, 15 FCC Rcd 3247 (2000)(declining to decide whether cable-based Internet access is a "cable service") ("*Internet Ventures*").

and its legislative history points directly to the conclusion that cable modem service is a "cable service" within the meaning of 47 U.S.C. §522(6). This means, of course, that cable modem service is regulated differently, and subject to different requirements, than potentially competitive alternative services which clearly are not a "cable service," such as dial-up Internet access and DSL services offered by ILECs and CLECs, and wireless Internet access services that may be provided by satellite and terrestrial wireless providers. But those differences in regulatory treatment reflect dividing lines drawn by Congress, and that only Congress can change.

In these comments, the City Coalition focuses on what it considers to be the two primary issues raised by the NOI. In Part I, we address the regulatory classification of cable modem services. In Part II, we address the issue of "open access." In Part III, we suggest that the Commission should institute a rulemaking to clarify that cable modem service is a "cable service."

I. THE REGULATORY CLASSIFICATION OF CABLE MODEM SERVICES.

The *NOI* requests comment on the regulatory classification of cable modem services and/or the cable modem platform. *NOI* at ¶¶15-24. Specifically, the *NOI* asks whether cable modem services and/or the cable modem platform should be considered to be a "cable service" subject to Title VI, a "telecommunications service" subject to Title II, an "information service" subject to Title I, or perhaps even none of the above. *Id.*

The Commission wisely raises this fundamental question at the outset of the *NOI*. Resolution of this threshold classification issue is essential, since it will have dramatic consequences on how all of the other issues raised by the *NOI* can be resolved.

The City Coalition believes that when the Act, pertinent legislative history and other relevant statutes and decisions are carefully considered and placed in context, the proper resolution of this vital threshold issue becomes clear. As we show in Part I (A) below, cable modem services should properly be considered a "cable service" within the meaning of 47 U.S.C. §522(6). In Part I (B), we point out that this means that cable modem services are subject to cable franchise fees, customer service standards, and the other requirements of Title VI, and that this result is fully consistent with the Commission's stated objectives in the *NOI*. In part I (C), we explain why cable modem service is not a "telecommunications service" within the meaning of 47 U.S.C. §153 (46). Finally, in Part I (D), we demonstrate that cable modem service is an "information service" within the meaning of 47 U.S.C. §153 (20) only if "cable service" is viewed to be a species of "information service."

A. Cable Modem Service Is A "Cable Service."

The *NOI* (at ¶ 16) invites comments on whether cable modem service is a "cable service" within the meaning of 47 U.S.C. § 522(6). The City Coalition strongly believes that it is.[2]

[2] We recognize that the *Portland* and *Gulf Power* decisions held otherwise, but as we point out in Parts I (C) and I (D) below, those decisions rested on an incomplete, and therefore erroneous, analysis of the relevant statutes and legislative history.

The place to begin, of course, is with the statutory language. "Cable service" is defined as:

> "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and
>
> (B) subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service."

47 U.S.C. § 522(6) (emphasis added).

As the *NOI* points out (at ¶16), the phrase "or use" was added by the Telecommunications Act of 1996. The legislative history of this 1996 amendment leaves no doubt that Congress intended the revised definition to encompass services like cable modem service. The Conference Report explains the purpose of adding the phrase "or use" as follows:

> "The conferees intend the amendment [adding "or use" to the "cable service" definition] to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services."[3]

Representative John Dingell amplified this point in his remarks during the floor debate on final passage of the bill that became the 1996 Act:

> "Mr. Speaker, I want to say a few special words about the concerns of our local elected officials, and most especially our mayors. This conference agreement strengthens the ability of local governments to collect fees for the use of

[3] H.R. Confer. Rep. No. 458, 104th Cong., 2d Sess. at 169 (Jan. 31, 1996) ("*1996 Conf. Report*"). *See also* H.R. Rep. No. 204, Part 1, 104th Cong., 1st Sess. at 106-107 (July 24, 1995) ("*1995 House Report*") ("Subsection (a) amends the definition of 'cable service' in Section 602(6) of the Communications Act by adding 'or use' to the definition, reflecting the evolution of video programming toward interactive services").

> public rights-of-way. For example, the definition of the term 'cable service' has been expanded to include game channels and other interactive services. This will result in additional revenues flowing to the cities in the form of franchise fees."[4]

The key point of this legislative history is that it makes plain the breadth of the expansion of the "cable service" definition that Congress intended the 1996 amendment to effect. The Conference Report to the 1996 Act, which is of course the best and most reliable legislative history in ascertaining Congressional intent,[5] is particularly noteworthy in its explicit reference to both "information services" and "enhanced services" provided over a cable system as being included within the expanded definition of "cable service." *1996 Conf. Report* at 169.

Congress' explicit inclusion of cable-delivered information and enhanced services in the 1996 expansion of the "cable service" definition removes an ambiguity in that definition that had existed since the enactment of the Cable Act in 1984. In 1984, of course, cable system technology was much more primitive, and no one envisioned the Internet.[6] Consequently, it should hardly be surprising that, from today's perspective, the legislative history of the 1984 Cable Act discussing the critical definitions of "cable service," "video programming," and "other programming service" (47 U.S. §§ 522(6), (14) and (20)) seems archaic, and appears not to encompass some features now associated

[4] 142 Cong. Rec. H1156 (daily ed. Feb. 1, 1996) (remarks of Rep. Dingell).

[5] *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 44 n.7 (1986); *Disabled in Action of Metropolitan New York v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000); *American Jewish Congress v. Kreps*, 574 F.2d 624, 629 n.36 (D.C. Cir. 1978).

[6] *See generally* B. Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, FCC OPP Working Paper No. 30, at 66-77 (Aug. 1998) ("*FCC OPP Paper*").

with cable modem service.[7] But this aspect of the 1984 legislative history does not detract from today's conclusion that cable modem service is a "cable service," for at least three reasons.

First, while much of the discussion in the 1984 legislative history may seem outdated today, one critical aspect of its explanation of the term "cable service" remains just as relevant today as in 1984, and sheds much-needed light on the dividing line that Congress intended to draw in defining "cable service":

> "The Committee intends this definition of cable services to mark the boundary between those services provided over a cable system which would be exempted from common carrier regulation under Section 621(c) [47 U.S.C. § 541(c)] and all other communications services that could be provided over a cable system."[8]

The City Coalition respectfully suggests that this general principle, which comfortably survives the immense technological changes of the last sixteen years, provides a far more reliable guide to Congress' intent than the isolated examples of specific services listed in the 1984 legislative history, a list that has been rendered obsolete by the passage of time and technological advances. Indeed, the non-common carrier/common carrier line Congress drew in 1984 in defining "cable service" is directly applicable to the proper classification of cable modem service.

Second, the plain meaning of the definition of "other programming service" in 47 U.S.C. § 522(14) controls over any narrower, and thereby conflicting, suggestion as to

[7] *See id.*; H.R. Rep. No. 934, 98th Cong. 2d Sess. 42-43 (1984) ("*1984 House Report*").

[8] *1984 House Report* at 41.

the meaning of that phrase in the 1984 legislative history.[9] And by any measure, the definition of "other programming service" is broad indeed: "information that a cable operator makes available to all subscriber generally." 47 U.S.C. § 522(14). Cable modem service easily fits within that broad definition. In those parts of their systems that have been sufficiently upgraded to offer cable modem service, cable operators uniformly offer it "generally" to all of their subscribers, just as they do in the case of more traditional cable services. And it is difficult to imagine that the content cable modem service delivers to subscribers does not qualify as "information."[10]

Third, the legislative history of the 1996 amendment to the "cable service" definition, when coupled with the broad plain meaning of the "other programming service" definition, explains why Congress, in amending the "cable service" definition in 1996, found it necessary only to add the phrase "or use" and made no change to the definition of "other programming service." Given the breadth of the original definition of "other programming service", there simply was no need to change it, for it was already more than broad enough to encompass the "information services" and "enhanced services" that Congress clearly intended to incorporate into the "cable service" definition in 1996.

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[9] *See e.g., Salinas v. U.S.*, 522 U.S. 52, 118 S.Ct. 469, 474 (1997); *United States v. Singleton*, 182 F.3d 7, 15 (D.C. Cir. 1999).

[10] Moreover, even the 1984 legislative history makes clear that "other programming service" includes "non-video information" and that the information may be created by third-parties other than the cable operator. *1984 House Report* at 41-42. *See also FCC OPP Paper* at 68.

Put slightly differently, the original language and legislative history of the 1984 Cable Act did "not freeze the scope of [the phrases "cable service" and "other programming service"] as of [1984]."[11] Instead, as the Supreme Court recently observed in an analogous context, "words in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic."[12] The 1996 legislative history therefore controls over the 1984 legislative history in construing what Congress intended the component parts of the "cable service" definition to mean.

That Congress clearly intended to include cable modem services within the definition of "cable service" is further underscored by the Internet Tax Freedom Act,[13] enacted just two years after Congress' 1996 expansion of the "cable service" definition. While Congress' later views (as expressed in the ITFA) about the meaning of the 1996 Cable Act amendments may not be dispositive, those views are certainly relevant in ascertaining Congressional intent.[14] And that is especially true in the case of the ITFA, since it represents Congress' subsequent thinking on the very issue at hand: treatment of Internet access over cable systems. Section 1104(8)(B) of the ITFA specifically exempts cable franchise fees imposed pursuant to 47 U.S. C. §542 from the definition of "tax[es]"

[11] *West v. Gibson*, 527 U.S. 212, 218, 119 S. Ct. 1906, 1910 (1999).

[12] *Id.*

[13] Title XI of Omnibus Appropriations Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-719 (1998) ("ITFA").

[14] *See, e.g., Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 840 (1988); *Grove City College v. Bell*, 465 U.S. 555, 567-68 (1984); *Cannon v. University of Chicago*, 441 U.S. 677, 686-88 n. 7 (1979); *Resolution Trust Corp. v. Miramon*, 22 F.3d 1357, 1363 (5th Cir. 1994).

that are subject to the Internet tax moratorium established by the ITFA.[15] That Congress believed it was necessary explicitly to exempt cable franchise fees -- which of course only apply to gross revenues derived "from the operation of a cable system to *provide cable services,*" 47 U.S.C. §542(b) -- from the reach of the ITFA tax moratorium strongly suggests that Congress believed cable modem service to be a "cable service." Otherwise, if cable modem service were not a "cable service," the cable franchise fee exemption in the ITFA would be sheer surplusage. But the law is settled that statutes must be construed so as to give effect to every phrase, so that no part of the statute is rendered superfluous.[16]

Thus, properly construed, the plain language of the 1984 Cable Act, the legislative history of the 1984 Cable Act, the plain language of the 1996 Cable Act amendments, the legislative history of those amendments, and the 1998 ITFA all point to one conclusion: cable modem service is a "cable service" within the meaning of 47 U.S.C. §522(6). Indeed, the *only* way to read these collective sources together in a coherent, consistent way is to classify cable modem service as a "cable service." And as we point out in Parts I (C) and (D) below, the other possible classifications of cable modem service -- as a "telecommunications service" or an "information service" -- simply cannot be reasonably stretched to fit the statutory language and legislative history.

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[15] ITFA, §1104(8)(B), codified as a note to 47 U.S.C. §151.

[16] *E.g., Bailey v. United States*, 516 U.S. 137, 145, 116 S. Ct. 501, 506-07 (1995); *United States v. Nordic Village*, 503 U.S. 30, 35, 112 S. Ct. 1011, 1015 (1992); *Independent Insurance Agents of America v. Hawke*, 211 F. 3d 638, 643-44 (D.C. Cir. 2000); *National Insulation Transportation Committee v. ICC*, 683 F. 2d 533, 537 (D.C. Cir. 1982).

B. As a "Cable Service," Cable Modem Service Is Subject to Cable Franchise Fees, Customer Service Requirements, Facilities and Equipment Requirements, and Privacy Requirements under Title VI.

The *NOI* asks (at ¶17) how the cable franchise fee provision in 47 U.S.C. §542 would apply if cable modem service were considered to be a "cable service." The City Coalition respectfully suggests that the answer is clear: If cable modem service is a "cable service," then revenues that a cable operator derives from that service are subject to cable franchise fees, because local governments may impose a franchise fee of up to 5% on "a cable operator's gross revenues derived. . . from the operation of the cable system *to provide cable services*." 47 U.S.C. §542 (b) (emphasis added).

The City Coalition wishes to make two further points about the application of cable franchise fees to cable modem service. First, subjecting cable modem service to cable franchise fees has had no adverse effect whatsoever on the growth and expansion of cable modem services. To the contrary, in most jurisdictions across the nation, cable operators to date have paid cable franchise fees on their cable modem service revenues.[17] And payment of franchise fees notwithstanding, cable operator deployment of cable modem service has grown by leaps and bounds.[18]

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[17] The only significant exception is Cox, which recently announced that in light of the *Portland* decision, it was discontinuing payment of franchise fees on cable modem service revenues in its California systems. *See Communications Daily* at 4-5 (Nov. 21, 2000).

[18] *See, e.g., Deployment of Advanced Telecommunications Capability: Second Report*, at 32-33 (FCC Aug. 2000) (cable modem service subscribers increased from 350,000 in 1998 to well over 1 million in 1999).

Second, if the logic of the *Portland* decision were applied nationwide and cable modem services were deemed not to be a "cable service," the cost to the nation's local governments in lost cable franchise fees would be staggering. The June 30, 2000, *Cable TV Law Reporter,* at 4, for example, estimates that excluding cable modem service revenues from cable franchise fees would deprive local governments of $72 million in franchise fee revenue this year, and $334 million per year by the end of the decade. In short, the financial loss to local governments if cable modem service is not classified as a "cable service" would cumulatively reach into the billions of dollars by the end of the decade. Yet this is precisely the revenue stream that Congress intended to include in cable franchise fees when it amended the "cable service" definition in 1996.[19]

The *NOI* also seeks comment (at ¶ 17) on the applicability of other Title VI provisions, such as customer service requirements, facilities and equipment requirements, and subscriber privacy requirements, to cable modem service. If, as the City Coalition believes, cable modem service is a "cable service," then these Title VI provisions would clearly apply to cable modem service. It is important to note, however, that these types of Title VI requirements represent nothing more than the basic fundamentals that any consumer receiving service deserves and, at the same time, are less burdensome on the operator than Title II-type regulation would be.

Several local jurisdictions have applied cable customer service standards to cable operators' cable modem service, and in many of these jurisdictions, cable operators have

[19] *See* text at note 4 *supra.*

agreed to such standards. These standards typically include such matters as telephone answering time and responsiveness to repair and installation requests. In the experience of City Coalition members, basic customer service standards such as these are necessary for cable modem service, as many subscribers have experienced service problems with cable modem service, especially in the areas of telephone response time and service outages. As in the case of applying customer service standards to cable operators' offering of more traditional cable services, however, it is important to keep in mind that cable customer service standards only apply to service problems associated with the operator's system or otherwise under the operator's control. Thus, for example, in the case of traditional cable programming services, a cable operator must field complaints and inquiries about content or signal quality problems associated with a particular video programming service, but if those problems are not due to the cable operator's system, the operator is not liable for failing to correct the problem. So, too, in the case of cable modem services, a cable operator must field complaints or inquiries about service problems with cable modem service, but the operator is responsible for correcting those problems only if they are due to the operator's system.

The facilities and equipment provisions of 47 U.S.C. §§ 544(b) and 546(b)(2) should apply to cable modem service. But again, as with other cable services generally, a local franchising authority cannot require a cable operator to provide a particular cable service. Thus, a franchising authority could, for instance, require in a franchise renewal that the operator's system be upgraded so that it is capable of providing cable modem service, but the franchising authority could not require that the operator provide cable

modem service, any more than the franchising could require the operator to provide video-on-demand or other premium service.

The privacy provision of 47 U.S.C. § 551 can and should apply to cable modem service.[20] Most local franchises incorporate these requirements, either explicitly or by reference. Given the breadth of the definition of "other service" in 47 U.S.C. § 551(a)(2)(B), however, the privacy requirements of Section 551 would appear to apply to cable modem service regardless whether it is deemed to be a "cable service."[21] Thus, classifying cable modem service as a "cable service" would not appear to expose it to any greater regulation under §551 than it would face even if it were not a "cable service."

In sum, because we believe that cable modem service is a "cable service," we also believe that cable modem service is subject to the same Title VI requirements that apply to other cable services. We submit that Title VI represents an appropriate balance between, on the one hand, the desire to minimize regulation to promote investment and service availability and, on the other, the need to provide subscribers with certain basic consumer protections. Moreover, the balance struck in Title VI is, in most respects, far less regulatory than the one struck in Title II, and therefore is particularly appropriate for a new, developing service like cable modem service.

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[20] *See, e.g., FCC OPP Paper* at 107-08.

[21] The provision of cable modem service unquestionably entails using at least some "of the facilities of a cable operator that are used in the provision of cable service." 47 U.S.C. § 551(a)(2)(B). For example, to provide cable modem service, cable operators clearly must use the local distribution facilities of the cable system that the operator also uses to provide more traditional cable services.

C. Cable Modem Service Is Not A "Telecommunications Service."

The *NOI* seeks comment (at ¶18) on whether cable modem service is a "telecommunications service" within the meaning of 47 U.S.C. §153 (46). For the reasons set forth in Part I (A) above, we believe the answer is "no": Cable modem service is a "cable service" and therefore not a "telecommunications service." This conclusion is confirmed by an assessment of the Communications Act definitions of "telecommunications" and "telecommunications service" and the relationship between them and the Act's definition and treatment of "cable services" subject to Title VI.

The Act defines "telecommunications" as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. §153(43). "Telecommunications service," in turn, is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. §153(46).

At the outset, three fundamental observations are in order that will guide all subsequent analysis of this definitional issue:

First, "telecommunications service" and "cable service" are mutually exclusive: a service may be one or the other, but not both. We know this because of the common carrier/non-common carrier dividing line drawn by the Cable Act,[22] and because certain

[22] *See 1984 House Report* at 41.

provisions of the Cable Act, like 47 U.S.C. §541 (b)(3), added in 1996, make no sense unless "telecommunications service" is separate and discrete from "cable service."[23]

Second, "telecommunications", unlike "telecommunications service" or "cable service," is not defined in terms of a service offered, but in terms of a functional capability. As a mere functional capability, this means that "telecommunications," unlike "telecommunication service," may be buried within, and consequently be but one of several other component parts of, a service other than "telecommunications service." Indeed, the functional capability of "telecommunications" is a component part of the offerings of virtually all persons who are in any business involving communications transmission (and by "communications," we refer broadly to telecommunications service providers, cable operators, television and radio broadcasters, and, yes, even ham radio operators and private business radio operators).

A few examples will prove the point. From the point of view of a traditional cable programmer (say, ESPN), part of what a cable operator offers is clearly "telecommunications." The cable programmer is certainly a "user" of the cable system, and (usually by contract with the cable operator) the cable system typically transmits information of the cable programmer's own choosing, to the points specified by the programmer -- *i.e.*, to the cable system's subscribers. Similarly, a television broadcast network is a "user" of its affiliate's local television transmission facility, which (again,

[23] For example, Section 541 (b)(3)(A)(i)'s exemption of a cable operator's provision of telecommunications services from the general cable franchise requirement of Section 541 (b)(1) would be nonsensical if a "telecommunications service" could also be a "cable service," or vice versa.

usually by contract between the network and the local affiliate) distributes information of the network's own choosing, to the points specified by the network -- *i.e.*, to all the television broadcast receivers in the area that can receive the transmission. And, of course, ham radio operators and private business radio operators (and, for that matter, owners of private, non-common carrier wireline facilities) use their own private transmission facilities to transmit information of their own choosing to desired recipients.

This leads us to the *third* key point: The mere fact that "telecommunications" functionality resides within a person's facilities or within a person's bundled service offering does *not* necessarily mean that the person is providing a "telecommunications service." To the contrary, unless the person offers the "telecommunications" function as a separate, unbundled service to the public, the person is *not* providing a "telecommunications service." Thus, to return to the previous examples, neither a cable operator providing traditional video programming, nor a television broadcaster, nor private radio or private network operators are considered to be providing "telecommunications service" even though "telecommunications" is a functional part of what each does.

The critical distinction, of course, is that in the cases of the cable operator, the television broadcaster, and the private radio and network operators, the owner of the facilities making "telecommunications" functionality possible also has ultimate control over the content of the information transmitted. In other words, control over content and control of the facilities possessing "telecommunications" functionality are merged.

It is important to note that this bundling of content and telecommunications functionality is *not* the result of technological limitations, but of legal boundaries drawn by the Communications Act. It would be technologically possible, for instance, to pry apart content and conduit in a cable system, taking away the operator's editorial control, and converting the cable system into a pure common carrier video system providing unquestioned video "telecommunications service" to system users.[24] Title VI, however, bars that arrangement from being mandatorily imposed on cable operators. *See* 47 U.S.C. §§541 (c) and 544 (f)(1). Thus, while one could certainly envision a world where "telecommunications" functionality must always be separated from, and offered independently of, content, that is not the world Congress created in the Communications Act.

Viewed against this backdrop, it becomes apparent that cable modem service is not a "telecommunications service." As an initial matter, "telecommunications" functionality is but one of many functionalities that are bundled together to form cable modem service.[25] Moreover, in offering cable modem service, the cable operator does not unbundle and separately offer the "telecommunications" component of cable modem service to the public -- either to its end-use subscribers or to third-party ISPs. Rather, the

[24] Indeed, the Act specifically contemplates that possibility in 47 U.S.C.§571 (a)(2), and the Commission recognized that possibility even before Section 571 was enacted in its now defunct video dialtone rules. *See National Cable Television Assn. v. FCC*, 33 F. 3d 66 (D.C. Cir. 1994).

[25] *See, e.g., Internet Ventures*, 15 FCC Rcd at 3253.

"telecommunications" component of the service is bundled together with the proprietary content of the cable modem service provider chosen by the cable operator.[26]

Of equal significance are the undisputed facts that subscribers cannot select ISPs that have not entered into agreements with the cable operator, nor does the cable operator offer such ISPs access to the unbundled "telecommunications" capability of its system. *See NOI* at ¶18. In short, neither cable modem service itself, nor a cable operator's offering of cable modem service, satisfies any of the elements of the statutory definition of "telecommunications service."

This conclusion is not altered by the fact that a cable operator may choose to enter into agreements with one or more unaffiliated ISPs to offer cable modem service over its system, as Time Warner and AT&T are considering doing.[27] That a cable operator may choose to carry the offering of more than one ISP on its system no more transforms the offering of a cable modem platform into a "telecommunications service" than a cable operators' decision to enter into agreements to carry some (but not all) traditional cable programmers on its system would transform the cable system into a video common carrier system within the meaning of 47 U.S.C. §571(a)(2). In neither case is the cable operator separately offering unbundled telecommunications functionality to the public; rather, the operator is choosing to carry certain content providers with whom it has

[26] *See, e.g., FCC OPP Paper* at 77-80.

[27] *See, e.g.*, "Time Warner, Earthlink Reach Deal, "*The Washington Post*, Nov. 21, 2000, at E1.

reached mutually acceptable commercial arrangements, whose services the cable operator is choosing to make available to its subscribers.

In light of these factors, the errors of the Ninth Circuit's holding in *Portland* become apparent. As an initial matter, because both of the parties to the appeal assumed that the @Home cable modem service was a "cable service," the Ninth Circuit did not have the benefit of briefing from the parties explaining why @Home was a "cable service." More fundamentally, however, the *Portland* ruling stemmed from the court's misinterpretation of both "cable service" and "telecommunications service."

With respect to "cable service," the court simplistically concluded that cable service is "one-way and general." 216 F. 3d at 876. But as we have seen, that is simply not true. Both the 1996 amendment to the "cable service" definition and its legislative history -- which the Ninth Circuit did not even mention -- leave no doubt that "cable service" includes two-way "information" and "enhanced" services. *See* Part I (A) *supra.* Moreover, the court's simplistic one-way/two-way distinction does not withstand scrutiny: some "cable services" are clearly "two-way," *see* Part I (A) s*upra*, while some "telecommunications services" are one-way, *see*, *e.g.*, 47 U.S.C. §571(a)(2). Finally, the court overlooked the obvious fact that cable modem service is indeed made "generally" available to all cable system subscribers.

The *Portland* court's analysis of "telecommunications service" is equally flawed. [28] According to the court, because @Home "controls all of the transmission facilities between its subscribers and the Internet," it provides a "telecommunications service" to "the extent that [it] provides subscribers Internet transmission over its cable broadband facility." 216 F. 3d at 878.

The difficulties with this analysis are twofold. First, neither @Home, nor any other cable modem service provider, "controls all of the transmission facilities between its subscribers and the Internet." The cable operator, *not* @Home, owns and controls the local cable system over which @Home is ultimately distributed to subscribers. That @Home may operate its own "proprietary national 'backbone,'" 216 F. 3d at 874, is beside the point. How a service happens to be delivered to a cable system headend does not transform it into a "telecommunications service." We doubt, for instance, that whether the Discovery Channel or TNT is a "cable service" turns on whether they are delivered to a cable system headend by common carrier facilities, telecommunications or non-telecommunications facilities owned by affiliates of the Discovery Channel or TNT, or by a courier delivering tapes on a bicycle.

Rather, the relevant point is that, as the Ninth Circuit recognized but apparently failed to comprehend, cable system subscribers "cannot purchase cable broadband access separately from [anyone other than @Home], and have no choice over terms of Internet

[28] The *Portland* court's analysis of "information service," 216 F. 3d at 877-78, is unilluminating because, as we show in Part I (D) below, the court overlooked the fact that "cable service" and "information service" are not mutually exclusive.

service such as content and bandwidth restrictions." 216 F.3d at 874. In other words, @Home is a service bundling information content and telecommunications functionality that the cable operator (TCI/AT&T in the case of *Portland*) chooses to carry on its system and to make generally available to system subscribers. In light of these undisputed facts, the *Portland* opinion offers no comprehensible explanation as to how @Home, or a cable operator's offering of @Home to subscribers, can plausibly be construed to fall within the definition of "telecommunications service."

In sum, the plain language of the Act's definition of "telecommunications services" simply cannot be contorted to fit the features and characteristics of cable modem service. Moreover, the *NOI's* interchangeable references to "cable modem service" and the "cable modem platform" do not alter this result. If, as we believe, cable modem service cannot be construed to be a "telecommunications service," then the cable system platform that a cable operator uses to provide that service cannot be pried apart from that service and treated as "telecommunications service", or, for that matter, a "telecommunications facility," unless one is prepared to accept the notion that a traditional, one-way, video-only cable system is also a "telecommunications facility," a notion that cannot be squared with other provisions of the Cable Act. *See, e.g.,* note 23 *supra.* The Act defines both "telecommunications service" and "cable service" based on the nature of the services offered to the public, *not* by the technical capabilities of some of the component parts of the physical facilities used to deliver those services. Viewed in that proper context, cable modem service is not a "telecommunications service," but a "cable service."

D. Cable Modem Service Is An "Information Service" Only To The Extent that "Cable Service" Is A Species of "Information Service."

The *NOI* also invites comment (at ¶23) on whether cable modem service is an "information service" within the meaning of 47 U.S.C. §153(20).[29] As previously noted, the City Coalition believes that cable modem service is a "cable service." Accordingly, cable modem service may also be an "information service" only to the extent that "cable service" and "information service" overlap with one another.

In fact, the language of the statutory definitions and the change in the "cable service" definition in 1996, considered together, point to the conclusion that "cable service" and "information service" do overlap. As noted above in Part I (A), the 1996 amendment to the "cable service" definition was explicitly intended to include "enhanced services" and "information services made available to subscribers by the cable operator."[30] This expansion, in turn, gives new meaning to the definition of "other programming service," which broadly includes any "*information* that a cable operator makes available to all subscribers generally."[31]

Moreover, the definition of "information service" is sufficiently broad to include "cable service." As already noted in Part I (C) above, a cable system (like most

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[29] The Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. §153 (20).

[30] *1996 Conf. Report* at 169.

[31] 47 U.S.C. §522 (14) (emphasis added).

communications facilities) contains "telecommunications" functionality. Viewed from this perspective, not only cable modem service, but also even traditional broadcast-like video cable services, are an "information service," because they "generat[e], acquir[e], stor[e] [in the case of video-on-demand]. . . retriev[e], utiliz[e], or mak[e] available information via telecommunications."

We recognize, of course, that the *Gulf Power* court reached the opposite conclusion, holding that "information service" is mutually exclusive of both "cable service" and "telecommunications service," and that Internet access over cable is not a "cable service". But the *Gulf Power* court's reasoning in reaching this conclusion is flawed in several respects.[32]

As an initial matter, the *Gulf Power* court appeared to assume without analysis that "cable service" and "information service" are mutually exclusive.[33] More fundamentally, the court's examination of the "cable service" definition rests entirely on a grossly inaccurate understanding of that term's language and legislative history. Thus, the court characterized a sentence in the *1995 House Report* as the "only sentence in the legislative history that attempts to explain Congress' change to the definition of 'cable service.'" 208 F. 3d at 1276. That is simply not true. *See* Part I (A) *supra*. Most critically, the *Gulf*

[32] For the reasons stated in Part I (C) above, however, *Gulf Power* correctly held that cable modem service is not a "telecommunications service."

[33] The only support for this proposition cited by the *Gulf Power* court was an unremarkable statement by the FCC that ISPs provide information services, 208 F. 3d at 1277 (quoting *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501 at ¶66 (1998)), but nowhere in that order did the FCC address, much less decide, whether "information service" and "cable service" are mutually exclusive.

Power court was apparently unaware of the *1996 Conf. Report*, the most reliable indicator of legislative intent, which squarely stated that the change in the "cable service" definition was specifically intended to include, among other things, "information services" provided by a cable operator to subscribers. *1996 Conf. Report* at 169.

The *Gulf Power* court then proceeded to dismiss the broad definition of "other programming service" by saying that it had been part of the "cable service" definition since the 1978 Pole Attachment Act, and since the Internet did not exist then, Congress could not have intended to include it. 208 F. 3d at 1276-77. Again, *Gulf Power* is simply wrong: There was no definition of "cable service" or "other programming service" in the 1978 Pole Attachment Act;[34] rather, those definitions first appeared in the 1984 Cable Act. Moreover, for all of its apparent preference for plain language over legislative history, the *Gulf Power* court shunned the unmistakable breadth of the plain language definition of "other programming service," and ignored the Supreme Court's teaching that the meaning of statutory words is not locked in a time capsule, but instead must be construed in light of subsequent changes in law or technology so as not to render those words anachronistic, s*ee West v. Gibson*, 527 U.S. at 218.

In short, the *Gulf Power* holdings that cable modem service is not a "cable service," and that "cable service" and "information service" are mutually exclusive, are erroneous. Cable modem service is in fact a "cable service," and to the extent that cable

[34] *See* Pub. L. No. 95-234, Sec. 6, 92 Stat. 33 (1978).

modem service is also an "information service," then "cable service" must be considered a species of "information service."

II. OPEN ACCESS ISSUES.

The *NOI* (at ¶¶25-49) seeks comment on a series of issues relating to open access. City Coalition members have differing views on the wisdom, as a matter of general policy, of imposing open access requirements on cable operators' provision of cable modem service.[35] But the Commission must keep in mind that the question of open access cannot be resolved in a vacuum --- that is, divorced from the proper regulatory classification of cable modem service under the Communications Act. If, as we believe, cable modem service is a "cable service" (or a "cable service" species of "information service"), Title VI places certain constraints on the Commission's options with respect to open access. If, on the other hand, cable modem service were to be construed to be a "telecommunications service" (wrongly, we believe), then the Commission has no choice but to apply the requirements of Title II, which, of course, represent the only tried and tested benchmark for truly open access.

Our point is that the Commission is not at liberty to classify cable modem services however it sees fit to achieve its policy preferences with respect to open access. That job

[35] By "open access," we mean requiring cable operators to allow third-party ISPs to purchase from cable operators unbundled transmission capability -- *i.e.*, "telecommunications service " -- on non-discriminatory rates, terms and conditions, and to allow cable system subscribers to access directly their ISP of choice over the cable system. *See NOI* at ¶¶27-28 and 30. The *NOI's* suggested "third model" -- where the cable operator enters into negotiated agreements for access with third-party ISPs (*NOI* at ¶30) -- is not "open access" at all. Rather, it is indistinguishable from the Title VI model, where cable operators enter into negotiated agreements with cable programmers that they choose to carry. While the Title VI model has been called many things, one thing it cannot honestly be called is "open."

is for Congress. We believe Congress has already spoken to that issue and classified cable modem service as a "cable service," which in turn means that Title VI, not Title II, applies.

If, however, the Commission were to decide (wrongly, we believe) that cable modem service is a "telecommunications service," then the City Coalition believes that the open access requirements of Title II must be applied to cable modem service. And that is true regardless whether the Commission may believe that open access is or is not a desirable policy goal. *See NOI* at ¶32.

We also believe that, if cable modem service is a "telecommunications service," forbearance under 47 U.S.C. §160 would *not* be appropriate. *See NOI* at ¶¶53-54. Based on current market facts and long historical experience, the factors set forth in 47 U.S.C. §160 (a)(1) and (2) cannot be met with respect to cable modem service at the present time.[36]

By any one of several measures, cable operators currently enjoy market power with respect to provision of high-speed Internet access to residential customers, and thus would warrant classification as a "dominant carrier" with respect to such services. According to the FCC's most recent broadband report, cable operators enjoy a 78% market share in the provision of high-speed Internet access to residential customers,

[36] We also believe that 47 U.S.C. § 160(a)(3) cannot be satisfied, but the Commission need not reach that issue since all three factors in §160(a) must be satisfied in order to forbear. If either §160 (a)(1) or (2) is not satisfied (and neither is), whether §160(a)(3) is satisfied becomes moot.

dwarfing DSL's 16% share.[37] In addition to this huge market share advantage, cable modem service also enjoys a sizable "first-mover" advantage over DSL in most residential markets. Moreover, DSL is subject to technical constraints that effectively prevent it from reaching all residences,[38] meaning that, at least for the foreseeable future, cable modem service will remain the only broadband access option for many residential consumers.

Nor can satellite or other wireless technologies be viewed as an adequate competitive alternative to cable modem service. Wireless delivery systems also suffer from technical constraints,[39] and in addition, remain largely embryonic at this time. Indeed, "[i]ndustry observers have questioned whether satellite-delivered [Internet access] service, which costs more than either cable modem or DSL and offers slower transmission speeds, would prove to be competitive as terrestrial-based technologies spread." [40] One conclusion is clear: wireless Internet access delivery systems cannot currently be considered to be a realistic competitive alternative to cable modem service, and whether they will in the future -- and, if so, when and to what degree -- remain unknown.

[37] *Deployment of Advanced Telecommunications Capability: Second Report,* at 33-34 (FCC Aug. 2000). Nor can dial-up, or narrowband, Internet access reasonably be viewed as an effective substitute for broadband access. The reason: it fails the basic test of cross-elasticity. The prices of broadband access offerings, such as cable modem service and DSL, far exceed the price of dial-up access, yet broadband access has continued to grow at a rapid rate, apparently largely unconstrained by far lower dial-up prices. This demonstrates that consumers do not perceive dial-up as an adequate substitute for broadband access.

[38] *See id.* at 22-23.

[39] *Id.* at 24-29.

[40] *Communications Daily*, Nov. 7, 2000, at 4.

Thus, for the foreseeable future, the local cable system and the distance-limited DSL offerings of ILECs will remain as the only two comprehensive local distribution systems capable of providing broadband Internet access to residences, and ILECs' DSL reach to residences will be more limited than that of the cable operator. Long history and experience teach that where one of at most only two owners of comprehensive local distribution facilities seeks to integrate conduit and content, a deregulated, Title II-less marketplace cannot be relied upon to ensure that unintegrated content providers (such as third-party ISPs) have fair and non-discriminatory access to the conduit owner's facilities.

Furthermore, there is certainly no evidence that Title II-type open access regulation is unnecessary to ensure that third-party ISPs have access to a cable operator's local distribution platform on reasonable and non-discriminatory rates, terms and conditions. *See* 47 U.S.C. §160(a)(1). There is, however, considerable evidence to the contrary.[41] Likewise, City Coalition members' experience with residents' complaints about customer service problems associated with cable modem service belies any suggestion that regulation is unnecessary to protect consumers. *See* 47 U.S.C. § 160(a)(2).

Accordingly, if the Commission determines (wrongly, we believe) that cable modem service is a "telecommunication service", there is no reasoned basis for the Commission to forbear under 47 U.S.C. § 160(a). Instead, cable operators' offering of

[41] *See, e.g.*, "Time Warner: Iron-fisted Cable Access Term Sheet for ISPs," <http://www.isp-planet.com/news/tw_term_sheet.html> (Nov. 1, 2000).

access to their cable modem platform should be subject to the full panoply of Title II requirements.

We recognize that, at first blush, it might seem a bit inconsistent to argue, on the one hand, that cable modem service is a "cable service" and therefore not subject to Title II open access requirements, and, on the other hand, that if cable modem service is a "telecommunication service," the full open access obligations of Title II should be applied to it. But any such superficial inconsistency is dispelled by the Communications Act.

As the Commission is well aware, Congress drew a sharp line between how "cable service" should be regulated under Title VI, and how "telecommunication service" should be regulated under Title II. Unlike telecommunications service providers under Title II, Congress granted cable operators under Title VI the right to operate essentially "closed" systems -- that is, subject to a few exceptions,[42] cable operators enjoy significant latitude in deciding what services they wish to carry and what services they may refuse to carry. Moreover, Title VI gives cable operators this privilege regardless whether -- and, indeed, despite the fact that -- they enjoy considerable market power in the delivery of cable services. Unlike the case of Title II, Congress for the most part chose in Title VI not to implement the prophylactic structural solution of requiring cable operators to unbundle conduit and content.[43]

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[42] *See, e.g.,* 47 U.S.C. §§531-36.

[43] Of course, as AOL and Time Warner may discover before the FTC, cable operators remain subject to antitrust laws with respect to their market power.

What prompted Congress to opt for a largely "closed" system in Title VI as opposed to the "open" system of Title II, and whether that policy choice was a wise one, would make for a lively debate topic. But these are the lines that Congress has drawn, and neither we nor the Commission can change them. Because we believe cable modem service is a "cable service," we believe it falls on the Title VI side of the boundary drawn by Congress, regardless of cable operators' market power. Because, however, we also believe that cable operators enjoy considerable market power over the delivery of broadband Internet access to the residential market, we also believe that, if cable modem service is instead determined to be a "telecommunications service," it should be subject to the special set of market power-ameliorating "open access" requirements that Congress created under Title II.

III. THE COMMISSION SHOULD PROMPTLY INSTITUTE A RULEMAKING TO CLASSIFY CABLE MODEM SERVICE AS A "CABLE SERVICE."

The last part of the *NOI* (at ¶¶ 50-56) seeks comment on the Commission's options. At bottom, we believe the Commission faces a fundamental choice in this proceeding: if the Commission determines that cable modem service is a "cable service," then it may continue its "hands-off" approach with respect to that service. If the Commission were instead to determine that cable modem service is a "telecommunications service," then we submit that the Commission's "hands-off" policy

must be abandoned, and cable modem services must be subject to the open access requirements of Title II.[44]

The Commission needs to decide which of these two routes to take, and it needs to do so decisively and without delay. As the Commission is no doubt aware, the *Portland* and *Gulf Power* decisions have created significant uncertainty and confusion among all of the affected industries, state and local governments, and the public. That uncertainty and confusion benefits no one.

Because cable modem service is a "cable service," we believe the proper course for the Commission is clear: The Commission should promptly initiate a rulemaking to classify cable modem service as a "cable service." The rulemaking should be completed, and rules adopted, as expeditiously as possible to eliminate the confusion and uncertainty that the misdirected decisions in *Portland* and *Gulf Power* have engendered.

CONCLUSION

For the foregoing reasons, the City Coalition urges the Commission promptly to institute a rulemaking proceeding to classify cable modem service as a "cable service" subject to Title VI. Alternatively, if the Commission were to conclude (wrongly, we believe) that cable modem service is a "telecommunications service," then the Commission should require cable operators to provide third-party ISPs with access to

[44] As noted above in Part I(D), determining that cable modem service is an "information service" would not permit the Commission to avoid making this fundamental choice. The reason: "information service" and "cable service" clearly overlap, and cable modem service would unquestionably fall within the class of information services that are also cable services.

operators' cable modem platforms pursuant to the full open access requirements of Title II.

Respectfully submitted,

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Dated: December 1, 2000

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